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October 28, 2005

RECEIVED

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PUBLIC SERVICE COMMISSION

Ms. Beth O'Donnell
Executive Director
Public Service Commission
211 Sower Boulevard
P. O. Box 615
Frankfort, KY 40602

Re: Joint Petition for Arbitration of NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius Communications, LLC on Behalf of Its Operating Subsidiaries Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Lexington, LLC, and Xspedius Management Co. of Louisville, LLC of An Interconnection Agreement With BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, As Amended
PSC 2004-00044

Dear Ms. O'Donnell:

Enclosed for filing in the above-captioned case are the original and ten (10) copies of BellSouth Telecommunications, Inc.'s Opposition to Joint Petitioners' Petition for Reconsideration and Clarification.

Very truly yours,

Dorothy J. Chambers

Enclosures

cc: Parties of Record

607814

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

JOINT PETITION FOR ARBITRATION OF NEWSOUTH COMMUNICATIONS CORP., NUVOX COMMUNICATIONS, INC., KMC TELECOM V, INC., KMC TELECOM III LLC, AND XSPEDIUS COMMUNICATIONS, LLC ON BEHALF OF ITS OPERATING SUBSIDIARIES XSPEDIUS MANAGEMENT CO. SWITCHED SERVICES, LLC AND XSPEDIUS MANAGEMENT CO. OF LEXINGTON, LLC, AND XSPEDIUS MANAGEMENT CO. OF LOUISVILLE, LLC	)	CASE NO. 2004-00044

OPPOSITION TO JOINT PETITIONERS'
PETITION FOR RECONSIDERATION AND CLARIFICATION

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October 28, 2005

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BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this Opposition to the Petition for Reconsideration and Clarification ("Petition") filed by NewSouth Communications Corp ("NewSouth"), NuVox Communications, Inc. ("NuVox"), and Xspedius Communications, LLC ("Xspedius") (collectively referred to as "Joint Petitioners")[1] with the Kentucky Public Service Commission ("Commission") regarding the Commission's September 26, 2005 *Order* in the above-captioned proceeding. As will be established below, the Commission should deny the Joint Petitioners' request for reconsideration and clarification.

INTRODUCTION

The purpose of a request for rehearing or reconsideration is to provide the Commission with an opportunity to correct errors of law or fact. For the overwhelming majority of the arguments presented by the Joint Petitioners in support of the instant Petition, the Joint Petitioners simply regurgitate the same stale arguments that the Commission previously considered and properly rejected, without specifying any alleged errors of law or fact. Accordingly, the Joint Petitioners present no reason for the Commission to deviate from its well-reasoned decision for Issue Nos. 4, 5, 6, 7, 9, 12, 51(c), 88, 97, and 102.[2]

Further, while there is much that the Parties disagree on, it appears that the Parties do agree as to the scope of what the Commission can order in a Section 252 agreement. In support of their arguments, the Joint Petitioners surprisingly assert in the Petition that "[t]he Commission is confined to imposing arbitration results that are consistent with 251 obligations and cannot impose the creation of exceptions to those obligations." JP Petition at 2. BellSouth agrees. And, the Joint Petitioners concession of this basic tenant of federal law supports if not definitely

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[1] Originally KMC Telecom V, Inc. and KMC Telecom III, LLC were parties to this arbitration proceeding. However, on May 31, 2005, the KMC entities filed a withdrawal with prejudice of their petition for arbitration. Thus, the KMC entities are no longer a party to this proceeding.

[2] Like the Joint Petitioners, BellSouth has also sought rehearing for Issue Nos. 36 and 51(b) but for different reasons.

proves BellSouth's position for several issues that are the subject of this Petition (Issue Nos. 36, 88, and 97) and those that are the subject of BellSouth's Motion for Rehearing (Issue Nos. 26, 37, 38, and 65). The Commission should consider this concession in reviewing all of the arguments presented by the Parties in support of rehearing.

ISSUE NO. 12

The Joint Petitioners object to the *Order's* rejection of the Joint Petitioners' proposed language regarding "Applicable Law." Specifically, the Commission found that "adopting the Joint Petitioners' contract term would lead to a lack of understanding in the interconnection agreement" and that "Applicable Law should be followed, but any disputes regarding the same should be brought before this Commission rather than presuming that they are automatically incorporated into the existing contract." *Order* at 8. The Commission's analysis is entirely correct and, as will be established below, should not be modified in any respect.

In support of their request for reconsideration, the Joint Petitioners assert two erroneous arguments. First, the Joint Petitioners claim that the Commission's decision does not encourage "meeting of the minds" but instead "will cause uncertainty as to the meaning of Applicable Law and will ultimately cause unnecessary disputes between the Parties." JP Petition at 2. The Joint Petitioners further argue that "where the Parties have reached a 'meeting of the minds' to deviate from Applicable Law, the Parties have expressly memorialized such deviation in the Agreement" and that "there has been no 'meeting of the minds' on exceptions from any other aspect of Applicable Law." *Id.*

This argument is incorrect and cannot be supported by the undisputed facts. It is undisputed that the Parties have been negotiating and defining their respective obligations in the agreement for almost three years. (GA Tr. at 429). Moreover, it is also undisputed that the

Parties agree that the interconnection agreement contains the Parties' interpretation of various FCC rules and decisions, that the Parties should be confident as to the scope of their obligations, and that the purpose in contracting is to express clearly the parties' agreement. (Johnson Depo. at 87, 95; GA Tr. 428-29; 431-32). Thus, complying with the *Order* will not lead to uncertainty as to each Party's respective obligations because the Parties have endeavored to include all appropriate rights and obligations expressly in the contract.[3]

Further, the Joint Petitioners claim that there has been a "meeting of the minds" regarding every deviation from Applicable Law is suspect at best (if not false). As conceded by the Joint Petitioners, there is no list identifying all agreed-upon deviations, and the Joint Petitioners are unable to identify all instances where the Parties agreed to deviate from Applicable Law. (KY Tr. at 68; GA Tr. at 441; Johnson Depo. at 85-86). Accordingly, it is implausible for the Joint Petitioners' to assert that there has been any "meeting of the minds" regarding deviations from Applicable Law when they cannot even identify all the alleged deviations to which they purportedly agreed.

Contrary to their arguments, and as correctly found by the Commission, adoption of the Joint Petitioners' language will lead to uncertainty and a lack of understanding of the Parties' respective rights and obligations. In particular, the Joint Petitioners' language would allow the Joint Petitioners to use Applicable Law to alter already agreed upon concepts and language in the agreement. Mr. Russell left no doubt as to the Joint Petitioners' intentions at the Georgia hearing:

> Q. Now do you believe that when the parties agree to something in the agreement that there should be an opportunity through this provision to reargue what the law means?

[3] For the reasons discussed *infra*, if there is a dispute, BellSouth's language protects both parties.

A. Not only should it be an opportunity but we've done that from time to time.

(GA Tr. at 435). Thus, the Joint Petitioners intend to use their language to do exactly what BellSouth fears and that the Commission determined was improper: review a telecommunications rule or order, interpret it in a manner that BellSouth could not have anticipated or is contrary to how the parties addressed the issue in the agreement, claim that such interpretation forms the basis of a contractual obligation (even though during the three years of negotiations the Joint Petitioners did not raise the issue), and then seek to enforce the obligation against BellSouth.

To further illustrate this point, the Joint Petitioners believe that (1) state unbundling laws are automatically incorporated into this Section 252 agreement upon execution, unless expressly excluded; and (2) BellSouth could be found in breach of state unbundling laws, even though the agreement never referenced them. (FL Tr. at 221, 223; Russell Depo. at 142-43; Johnson Depo. at 90-92). The Joint Petitioners further contend that, even if federal law provides that BellSouth no longer has an obligation to provide an unbundled element, and even though the agreement never referenced state unbundling law, BellSouth could still be obligated under state law to provide that element via this agreement. (FL Tr. at 224-25). Such a result conflicts with the entire rationale for entering into a Section 252 arbitration agreement as well as the doctrine of preemption.[4]

[4] Further, an ILEC only has an obligation under the Act to negotiate those duties listed in Section 251(b) and (c) of the Act. *Coserv Limited Liab. Corp. v. Southwestern Bell Tel.*, 350 F.3d 482, 487 (5th Cir. 2003). As stated by the Fifth Circuit, a state commission " . . . may arbitrate only issues that were the subject of the voluntary negotiations" and that "[a]n ILEC is clearly free to refuse to negotiate any issue other than those it has a duty to negotiate under the Act when a CLEC requests negotiation pursuant to §§ 251 and 251." *Id.* Adoption of the Joint Petitioners' language violates the legal principles established in *Coserv* as it essentially requires BellSouth to negotiate and arbitrate non-251 issues, including state unbundling laws, even though the Parties never addressed such issues either in negotiation or arbitration in a Section 252 agreement.

Simply stated, the Joint Petitioners' approach is an invitation to on-going disputes rather than the certainty the parties reasonably should expect from an agreement. The Florida Commission and a Panel of the North Carolina Commission agree, as they both rejected the Joint Petitioners' proposed language for this issue. *See* FPSC Order No. PSC-05-0975-FOF-TP at 16 ("The purpose of an agreement is to create specific obligations to do or not to do a particular thing. We find it is essential to have a document that contains specific terms and conditions. That being said, a provision in the Agreement stating when explicit language would apply and when it would not, could cause more confusion."); *Recommended Order*, NCUC Docket No. P-772, Sub 8 (Jul. 26, 2005) (The Joint Petitioners' language "amounts to a 'roving expedition' for a party to seek out other law, 'no matter how discreet," to supply terms for the Agreement. The Commission believes this goes too far and is out of harmony with what a standard applicable law provision is supposed to do.").

Second, the Commission should also disregard the Joint Petitioners' attempt to brow-beat the Commission into adopting their position by claiming that the *Order* violates Georgia law. The Commission should not feel threatened by the Joint Petitioners' statements. What should be of concern to the Commission is that the Joint Petitioners intend to use this provision to take positions contrary to which they have already agreed or to create new obligations, not in existence in the agreement, based upon some new reading of Applicable Law. The Commission correctly recognized that this power "would lead to a lack of understanding in the interconnection agreement." *Order* at 8.

And, the Joint Petitioners are not harmed by the adoption of BellSouth's language. It only applies when one Party asserts an obligation ***not expressly memorialized in the agreement*** regarding an FCC Rule or Order or substantive telecommunications law and the other Party ***disputes the existence*** of that obligation. Further, it provides the Commission with an

opportunity to resolve the dispute. This process in no way violates Georgia law, to the extent applicable. It simply provides a means for the Parties to resolve disputes regarding the existence of an obligation that is not directly addressed in the agreement and protects both Parties from the other Party abusing Applicable Law to eviscerate current obligations or to impose upon a Party an obligation that was never contemplated.

In addition and importantly, under the agreement, Georgia law is not controlling in all circumstances. It does not displace or supersede "federal and state substantive telecommunications law." *See* GTCs at § 22.1.[5] Federal substantive telecommunications law provides that an ILEC only has an obligation under the Telecommunications Act of 1996 (the "Act") to negotiate those duties listed in Sections 251(b) and (c) of the Act. *Coserv Limited Liab. Corp. v. Southwestern Bell Tel.*, 350 F.3d 482, 487 (5th Cir. 2003). As stated by the Fifth Circuit, a state commission " . . . may arbitrate only issues that were the subject of the voluntary negotiations" and that "[a]n ILEC is clearly free to refuse to negotiate any issue other than those it has a duty to negotiate under the Act when a CLEC requests negotiation pursuant to §§ 251 and 251." *Id.*

Adoption of the Joint Petitioners' language violates the legal principles established in *Coserv* as it essentially requires BellSouth to negotiate and arbitrate non-251 issues, including state unbundling laws, even though the Parties never addressed such issues either in negotiation or arbitration in a Section 252 agreement. Accordingly, even under the terms of the Agreement,

[5] The Governing Law provision of the Agreement provides: "Where applicable, this Agreement shall be governed by and construed in accordance with federal and state substantive telecommunications law, including rules and regulations of the FCC and appropriate Commission. In all other respects, this Agreement shall be governed by and construed and enforced in accordance with the laws of the State of Georgia without regard to its conflict of laws principles." *See* GTCs at § 22.1. And, while state law applies to the Agreement, it only is applicable to the extent it relates to a Party's "obligations under this Agreement", which is a Section 252 agreement under the Act. *Id.* at § 32.1.

Georgia law cannot be used to displace this fundamental, legal principal established under federal law.[6]

For all these reasons, the Commission should deny the Joint Petitioners' request that the Commission reconsider its decision for Issue No. 12. The Commission correctly rejected the Joint Petitioners' language and nothing asserted by the Joint Petitioners requires a different conclusion.

ISSUE NO. 5

The Joint Petitioners seek reconsideration of the Commission's rejection of the Joint Petitioners' position in determining that the "Joint Petitioners should use the industry standard limitation of liability in their relationship with their end-users to limit the exposure to which BellSouth would be subject in the absence of such industry standard language." *Order* at 4. As a result, the Commission correctly recognized in the *Order* that BellSouth should not suffer any financial hardship as a result of a Joint Petitioner business decision simply because it is the wholesale provider of the Joint Petitioners' underlying service.[7]

The Florida Commission and the North Carolina Commission Panel agree as they also adopted BellSouth's language on this issue. *See* FPSC Order No. PSC-05-0975-FOF-TP at 10 (". . . CLECs have the ability to limit their liability through their customer agreements and/or tariffs. If a CLEC does not limit its liability through its customer agreements and/or tariffs, then the CLEC should bear the resulting risk."); *Recommended Order*, NCUC Docket No. P-772, Sub 8 at 13 ("There is no evidence the proposed language has caused a dispute or adversely affected

[6] The Joint Petitioners appear to agree as they concede in their Petition that "[t]he Commission is confined to imposing arbitration results that are consistent with 251 obligations and cannot impose the creation of exceptions to those obligations . . . ." JP Petition at 2.

[7] In fact, the *Order* is essential to protect BellSouth because (1) BellSouth is required as a matter of federal law to provide wholesale services to the Joint Petitioners at certain prices; (2) BellSouth does not have contracts with the Joint Petitioner end users; and (3) the Joint Petitioner end users do not purchase services out of BellSouth's tariffs, which limit BellSouth's liability to bill credits.

a third party or that the CLPs have in fact relaxed their limitation of liability language. . . The Commission concludes that if a party elects not to place standard industry limitations of liability in its contracts with end users or in its tariffs, that party shall indemnify the other party for any loss resulting from this decision.").

To support reconsideration, the Joint Petitioners first argue that the *Order* "limits the Joint Petitioners' ability to gain and maintain customers by offering more flexible and commercially reasonable liability terms." JP Petition at 4. This argument, however, should be given little credence because it is based on pure fiction. For instance, in discovery, the Joint Petitioners could not identify a single, specific instance where they had to concede limitation of liability language to attract a customer. *See* Joint Petitioners Response to Interrogatory No. 22. Additionally, in their depositions, each of the Joint Petitioners stated that they were not aware of a specific instance where an end user contract deviated from standard limitation of liability language. *See* Johnson Depo. at 29-30; Falvey Depo. at 33; Russell Depo. at 46. In fact, Mr. Russell testified in his deposition that NuVox's contracts incorporate by reference NuVox's tariffs. He also testified that NuVox alters its limitation of liability language in its contracts "once in a while" and that he did not know how frequently these changes occurred. *See* Russell Depo. at 28-29; 84-85. Thus, the Joint Petitioners' claim that they negotiate liability terms is suspect at best and was rightly rejected by this Commission.

Moreover, the Parties have been complying with this same language in their current agreement, and there has never been a dispute regarding its application, even though the Joint Petitioners have been competing against BellSouth during this time period. (FL Tr. at 204-05; KY Tr. at 64-65). And, in any event, it is highly unlikely that the Joint Petitioners will deviate from their standard tariffed language in contracts and tariffs in light of the undisputed fact that (1) the Joint Petitioners currently have limitation of liability language in their tariffs and

contracts; (2) they believe that their language is the maximum limit allowed by law; (3) they have no plans to remove this language; (4) their tariffs are in force and in effect today; and (5) they intend to enforce tariff provisions limiting their liability. (FL Tr. at 203; Russell Depo. at 87, 91; Falvey Depo. at 61; Johnson Depo. at 61; *see also* JP Brief at 16, JP Attachment 1; *see also* XSP00004). Accordingly, the Commission correctly rejected the Joint Petitioners' claim that adoption of BellSouth's language will prevent them from competing against BellSouth. Such an argument is repudiated by the actual history of the parties and the Joint Petitioners' own tariff and contract language.

Second, the Joint Petitioners continue to argue that the *Order* is unfair because BellSouth deviates from its standard limitation of liability terms in its customer service arrangements ("CSAs"). JP Petition at 4, 5. The Commission correctly rejected this tired argument in the *Order*. There is no evidence to support it as it is based on the Joint Petitioners' attempt to turn the absence of evidence into an affirmative fact. *Id.* at 5. Indeed, although she was not aware of any specific CSAs that deviated from BellSouth's tariff language, BellSouth witness Blake did testify that CSAs differ predominantly in price only. (FL. Tr. at 947). Thus, the Commission correctly refused to adopt this baseless argument.[8] *Order* at 4-5.

Third, and unbelievably, the Joint Petitioners argue that the provision of bill credits is not the standard limitation of liability language in the industry. JP Petition at 5. The Joint Petitioners make this claim even though (1) this standard applies to BellSouth's retail customers and is the same standard that governs the parties in their current interconnection agreements (KY Tr. at 25; GA Tr. at 381; FL Tr. at 182, 943; Exhibit 14 at § A2.5.1); (2) the Joint Petitioners' tariffs and standard contracts limit their exposure to bill credits. (FL Tr. at 182, 184; FL Exhibit

[8] As determined by the Commission, if and when the Joint Petitioners have actual evidence that BellSouth is "holding the Joint Petitioners" to a higher standard than BellSouth, then the "Joint Petitioners are free to petition this Commission for redress." *Order* at 4-5.

15 at § 2.1.3(C); Russell Depo at 145-146); and (3) dispositive of the issue, the Joint Petitioners concede that the provision of bill credits is "probably the current practice" in the industry. *See* Russell Depo. at 82-83. Consequently, the Joint Petitioners' refusal to acknowledge bill credits as the standard in the industry – the same standard that the Joint Petitioners employ in their own tariffs and contracts – is meritless.

Fourth, the Commission should also reject the Joint Petitioners' request that the Commission modify its ruling such that a commercially reasonable standard applies to CSAs. JP Petition at 6. This modification guts the protections ordered by the Commission by relieving the Joint Petitioners of any obligation to BellSouth if the Joint Petitioners determine that it is not "commercially reasonable" for them to refuse to limit their liability to their end users within industry standards. Thus, with their proposed modification, the Joint Petitioners seek to interpose a universal excuse for not complying with the obligations ordered by the Commission. And, BellSouth cannot even evaluate how likely it is that this "excuse" will be utilized, because the Joint Petitioners cannot identify a single, specific instance where they actually have deviated from their tariffed language in a CSA.[9] Accordingly, the Joint Petitioners' proposed revisions result in the potential emasculation of the protections afforded to BellSouth by the Commission.

For all of these reasons, the Commission should deny the Joint Petitioners' request to reconsider or modify in any respect its decision for Issue No. 5.

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[9] Again, because the Joint Petitioners' standard CSAs incorporate provisions of the Tariff, including limitation of liability provisions, it is not even clear why the Joint Petitioners are even requesting this modification. *See* Russell Depo. at 28-29; 84-85; *see also*, XSP00004 (providing (1) the terms and conditions contained in the contract "supplement" those set forth in Xspedius' tariffs (Preamble); (2) "[i]n the event of any conflict among the Agreement and its Addenda, Attachments, Service Order Forms, or the terms or rates of Xspedius' tariffs, ***the terms and rates of the tariff shall control*** if the service itself is tariffed" (Preamble) (emphasis added); (3) Xspedius' liability for the interruption of tariffed service is limited to bill credits (§ 6); and (4) the "[c]ustomer's exclusive remedies under this Agreement shall be (i) the termination of rights in section 6, and (ii) any credits for outages specifically set forth in the Agreement." (§ 15)).

ISSUE NO. 7

The Joint Petitioners seek reconsideration of the Commission's rejection of their proposed language regarding indemnification because the Commission found "that it is too broad and too vague." *Order* at 6. The thrust of the Joint Petitioners' argument in support of reconsideration is that their proposed language is not too broad as compared to BellSouth's language and that the *Order* "defies reason". JP Petition at 7.

As an initial matter, the Commission correctly found that the Joint Petitioners' language is "too broad and too vague." At its core, the Joint Petitioners' language states that the providing Party is obligated to indemnify the receiving Party for "(1) the providing Party's failure to abide by Applicable Law, or (2) injuries or damages arising out of or in connection with the Agreement to the extent caused by the providing Party's negligence, gross negligence or willful misconduct." *See* Joint Petitioner Exhibit "A" GT&C at § 10.5. There is no reciprocal obligation for the receiving Party to indemnify the providing Party in these same circumstances.

It is undisputed that the Joint Petitioners will be the receiving Party and BellSouth will be the providing Party in the majority of cases. (KY Tr. at 67; FL Tr. at 199). Thus, as the providing Party, BellSouth has virtually unlimited indemnification obligations to the Joint Petitioners while the Joint Petitioners have essentially no indemnification obligations to BellSouth. Consequently, if adopted, BellSouth would have no indemnification rights against the Joint Petitioners even if sued by a Joint Petitioner end user solely because of the negligence of a Joint Petitioner. Conversely, however, BellSouth would have to indemnify the Joint Petitioners in this scenario and other, more expansive scenarios, because the Joint Petitioners' language also applies to violations of "Applicable Law" as well as to claims brought by any third-party, not just end users. Clearly, such a biased indemnification obligation is unwarranted

and inequitable, especially when BellSouth must charge the Joint Petitioners government-mandated TELRIC rates.

In contrast, the ordered language requires the receiving Party to indemnify the providing Party in two limited situations: (1) claims for libel, slander, or invasion of privacy arising from the content of the receiving Party's own communications (which is not in dispute); or (2) any claim, loss, or damaged claimed by the "End User or customer of the Party receiving services arising from such company's use or reliance on the providing Party's services, actions, duties or obligations arising out of this Agreement." *See* BellSouth Exhibit A, GT&C at § 10.5. This language is considerably narrower than the Joint Petitioners' proposal, which would require BellSouth to indemnify the Joint Petitioners for all claims, regardless of whether the claims were brought by an end user or whether it related to services provided under the Agreement. Accordingly, the Commission correctly rejected the Joint Petitioners' proposed language.

The Joint Petitioners cannot even identify an interconnection agreement that contains indemnification language that is similar to what they propose here. *See* Russell Depo. at 119. And, the Joint Petitioners do not include similar language in their end user contracts and tariffs. Indeed, none of the Joint Petitioners' tariffs or contracts imposes upon the Joint Petitioners (as the providing party) the same indemnification obligations that they seek from BellSouth.[10] Rather, the subject tariffs and contracts establish that the Joint Petitioners, as the providing party, demand that they be indemnified by their customers and that they be limited or totally relieved from having any indemnification obligations to these same customers. This undisputed fact

[10] Indeed, NuVox's tariffs require end users to indemnify it for "any act or omission" and do not require NuVox to indemnify the end user in any instance. (Tr. Vol. 1 at 749-750; Panel Exhibit 3 at 5). Likewise, the Xspedius template contract (XSP 00004) requires the customer or party receiving service to indemnify Xspedius for any loss "that arises out of, or is directly or indirectly related to, ... any act or omission of Customer." Xspedius, however, is not willing to provide BellSouth with these same protections. And, unlike BellSouth's proposed language, Xspedius provides no indemnification rights to the end user as its contract states that "Xspedius will not be liable for ... (6) claims against Customer by any other party." *See* XSP 00004, § 15.

proves once again that the Joint Petitioners seek rights against BellSouth as the providing Party that they are not willing to provide to their own end users. Joint Petitioners' position, and not the *Order*, "defies reason."

Moreover, the Joint Petitioners are again incorrect when they restate that "BellSouth's refusal to accept Joint Petitioners' language amounts to their foisting upon these CLECs the obligation to act as BellSouth's insurance carrier." JP Petition at 8. Each of them have provisions in their tariffs and contracts that preclude the Joint Petitioners from sustaining any liability for the actions of service providers, like BellSouth. *See* NuVox Tariff at § 2.1.4(H); KMC Tariff at § 2.1.4(c); Xspedius Tariff at § 2.1.4.3; Russell Depo at 145-147; Johnson Depo. at 51. Thus, the Joint Petitioners cannot be BellSouth's insurance carrier because Joint Petitioners already insulate themselves from any potential liability that may result from BellSouth's actions.

Finally, while the North Carolina Commission Panel adopted the Joint Petitioners' language in its arbitration proceeding (a finding to which BellSouth objected), the Florida Commission rejected both Parties' proposed language. *See* FPSC Order No. PSC-05-0975-FOF-TP at 13. Of particular importance, however, and consistent with this Commission's determination, the Florida Commission found that ". . . we do not find a compelling reason to deviate from the usual practice of limiting liability through the use of its tariffs. . . We find that the carrier with a contractual relationship with its own customers is in the best position to limit its own liability against that customer in instances other than gross negligence and willful misconduct." *Id.* Further, this Commission's decision is entirely consistent with the *Virginia Arbitration Order*, where the Federal Communication Commission's ("FCC") Wireline Competition Bureau rejecting MCI's indemnification language, found:

> In addition, we are not convinced that Verizon should indemnify WorldCom for all claims made by WorldCom's customers against WorldCom. Verizon has no contractual relationship with WorldCom's customers, and therefore lacks the ability to limit its liability in such instances, as it may with its own customers. As the carrier with the contractual relationship with its own customers, WorldCom is in the best position to limit its own liability against its customers in a manner that conforms with this provision.[11]

Likewise, the Minnesota Commission also has rejected similar indemnification language.[12] In that proceeding, as here, AT&T attempted to have the ILEC indemnify it for any breach of "Applicable Law." The Minnesota Commission rejected AT&T's arguments and proposed language. Thus, the Commission's decision in the *Order* rests on sound ground and should not be modified on reconsideration.

For all of these reasons, the Commission should reject the Joint Petitioners request to reverse its decision on Issue No. 7 and impose indemnification obligations on BellSouth that are completely one-sided in favor of the Joint Petitioners.

ISSUE NO. 9

Next, the Joint Petitioners request that the Commission reconsider its decision for Issue No. 9 wherein it found that "disputes arising under . . . interconnection agreements must be brought before the Commission before they proceed to a court of general jurisdiction." *Order* at 7. In support of this decision, the Commission stated that "[i]t is beyond dispute that state commissions are authorized to interpret and to enforce interconnection agreements which are approved pursuant to 47 U.S.C. § 252(e)(1)" and that the "Commission has primary jurisdiction

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[11] In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(E)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation, CC Docket No. 00-251, 17 FCC Rcd. 27,039 (July 17, 2002) ("*Virginia Arbitration Order*") at ¶ 709.

[12] *In re: Petition of AT&T Communications of the Midwest, Inc.*, Minn. P.U.C., Docket No. P-442, 421/IC-03-759, 2003 WL 2287903 at *17-18 (Nov. 18, 2003) ("*Minnesota Arbitration Order*").

over issues regarding the interpretation and implementation of interconnection agreements approved by the Commission." *Id.*

The Joint Petitioners' request for reconsideration is premised on two arguments: (1) the Commission does not have jurisdiction to handle all types of disputes; and (2) the Commission does not have the authority to restrict the jurisdiction of a court. JP Petition at 11-12. The Commission considered both of these arguments already and the Joint Petitioners provide no new arguments that require the Commission to reverse its decision.

Regarding the first argument, the Joint Petitioners claim that the Commission will not be "the proper forum for all disputes and the Commission should not foreclose the Joint Petitioners' options to seek resolution in alternative venues." JP Petition at 11. Implicit in the *Order*, however, is that the Commission adopted BellSouth's language for this issue. This language makes it clear that, to the extent a dispute is outside the expertise or jurisdiction of the Commission, the Parties may seek redress in an appropriate court. Accordingly, contrary to their assertions, if a damages claim or a "Robinson Patman claim" is the dispute in question and the Commission does not have jurisdiction for such a claim, BellSouth's language provides the Parties with the opportunity to bring that dispute before a court. This concept is no different than the provision that the Parties already have agreed to requiring disputes regarding Intellectual Property to "be brought in a court of competent jurisdiction." *See* GTCs at § 11.5.

Recognition that the Commission may not have jurisdiction or expertise for certain, discrete claims, however, does not equate to a finding that the Commission is not the expert for resolving disputes relating to interpretation and enforcement of the Agreement. Federal law recognizes state commissions' expertise. Specifically, Section 252(e)(1) requires that any interconnection agreement adopted by negotiation or arbitration be submitted to the commission for approval. (FL Tr. at 814; KY Blake Direct at 17). As such, this Commission properly

recognized it is in the best position to resolve disputes relating to the interpretation or enforcement of an agreement that it approves pursuant to the Act.

The Eleventh Circuit used this same rationale to find that state commissions have the authority under the Act to interpret interconnection agreements. *See BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc.*, 317 F.3d 1270, 1277 (11th Cir. 2003). As stated by the court: "Moreover, the language of § 252 persuades us that in granting to the public service commissions the power to approve or reject interconnection agreements, Congress intended to include the power to interpret and enforce ***in the first instance*** and to subject their determination to challenges in the federal courts." *Id.* (emphasis added). The FCC has also held that, "'due to its role in the approval process, a state commission is well-suited to address disputes arising from interconnection agreements.'" *Id.* (quoting *In re: Starpower*, 15 FCC Rcd at 11280 (2000)). The Joint Petitioners do not challenge this authority. Accordingly, the Commission correctly determined that disputes relating to interconnection agreements it approves pursuant to the Act should be brought to the Commission for resolution.

The Joint Petitioners' second argument also is unavailing. Contrary to the Joint Petitioners' claims, BellSouth's language does not result in this Commission changing or limiting the jurisdiction of courts. JP Petition at 12. This claim is a red-herring, designed to mislead the Commission from properly preserving its authority and utilizing its expertise to address interconnection agreement disputes. Simply stated, the *Order* in no way limits, strips, or restricts the jurisdiction of any court. Rather, in the *Order*, the Commission presumably recognized that, for various state telecommunications policy reasons (including expertise, efficiency, knowledge, expediency, resource constraints, etc. ...), it should be the initial forum to address interconnection agreement disputes that are within their jurisdiction and expertise.

Making such a finding does not equate to the Commission stripping a court of its constitutional authority.

For all of these reasons, the Commission properly rejected the Joint Petitioners' arguments in the *Order*, and the Commission should not reconsider this sound decision.

ISSUE NO. 4

The Joint Petitioners object to the Commission's finding that each party's liability to the other for acts of negligence is limited to bill credits. *Order* at 3. The Commission properly has rejected the Joint Petitioners' unprecedented and totally one-sided limitation of liability proposal of 7.5 percent of amounts paid or payable on the day the claim arose. The Commission correctly found that "[t]he Joint Petitioners can provide no rationale for why 7.5 percent of amounts paid is reasonable." *Id.*

The Commission's rejection of the Joint Petitioners' language is in accordance with the Florida Commission and the North Carolina Commission Panel who also have rejected the Joint Petitioners' proposed language and adopted bill credits as the standard. *See* Order No. PSC-05-0975-FOF-TP at 8 ("Further, we find that BellSouth shall treat the Joint Petitioners in the same manner BellSouth treats its own retail customers. It is undisputed that BellSouth's liability to its own retail customers is limited to the issuance of bill credits; therefore, it is appropriate for BellSouth's liability to Joint Petitioners to be similarly limited."; *Recommended Order*, NCUC Docket No. P-772, Sub 8 at 11 ("The Commission finds that BellSouth's language is more appropriate. The FCC's *Virginia Arbitration Order* (July 17, 2002) reviewed a similar issue in an arbitration between Verizon Virginia, Inc. (Verizon) and WorldCom). There, the FCC

concluded that it was appropriate for Verizon to treat WorldCom in the same manner as it treats its own customers."). [13]

On reconsideration, the Joint Petitioners raise the same three arguments in an attempt to persuade the Commission to change this correct decision. However, none of these arguments require that the Commission reach a different conclusion. First, the Joint Petitioners argue that the *Order* makes the "Joint Petitioners solely responsible for 100% of the costs associated with BellSouth's negligence. . . ." JP Petition at 15. This statement is incorrect. Under the *Order*, each party's liability to the other is limited to bill credits for the service not provided. Thus, it is impossible for the Joint Petitioners to be 100 percent responsible for the costs of a negligent act because they will receive bill credits.

Further, the Joint Petitioners' tariffs and standard contracts limit their exposure to bill credits and also insulate them from any liability for damages that result from the actions of service providers, including BellSouth. *See* NuVox Tariff at § 2.1.4; KMC Tariff at § 2.1.4; 2.1.6; Xspedius Tariff at § 2.1.4; 2.1.6, attached as KKB-2; Hamilton Depo at 145-146. Thus, bill credits compensate the Joint Petitioners for losses that may result from BellSouth's

[13] *See also, In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(E)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission*, CC Docket No. 00-218, 17 FCC Rcd. 27,039 (Jul. 17, 2002) ("*Virginia Arbitration Order*") at ¶ 709, the Wireline Competition Bureau of the FCC determined that an ILEC should treat a CLEC in the same manner that it treats its retail customers: "Specifically, we find that, in determining the scope of Verizon's liability, it is appropriate for Verizon to treat WorldCom in the same manner as it treats its own customers." *See also, Sprint Communications, LP*, Case No. 96-1021-TP-ARB (Ohio P.U.C. Dec. 27, 1996), 1996 WL 773809 at *32 ("The panel does not believe that GTE's proposal to limit its liability to Sprint to the same degree it limits its liability to its own retail customers is unreasonable .... In accordance with the Commission's award in 96-832, it is appropriate for GTE to limit its liability in the same manner in which it limits its liability to its customers."); *In the Matter of the Petition of the CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P.,* Docket No. 05-BTKT-365-ARB, Kansas Corporation Commission at 102 (Feb. 16, 2005) (refusing to adopt the Joint Petitioners' and CLEC proposal for limitation of liability language that exceeded bill credits).

negligence.[14] Accordingly, the bill credit standard – the same standard that governs the current agreement and which both BellSouth and the Joint Petitioners use with their own customers – does not leave the Joint Petitioners "solely responsible" for the costs of a negligent act.

Second, the Joint Petitioners once again urge the Commission to follow terms and conditions in general service contracts based on the claim their language is "in keeping with 'contracts of other vendors and service providers.'" JP Petition at 15. Of course, so-called concepts of commercial reasonableness, standards in the business world, and settled principles of contract law do not apply in a Section 252 agreement. Multiple tribunals, including federal courts, have found that a Section 252 agreement is not an ordinary or typical commercial contract and should not be construed or treated as such.[15]

Accordingly, even if accurate, the concepts of commercial reasonableness or what is contained in the "contracts of other vendors and service providers" have no application in a Section 252 agreement. If they did, then the parties would not be before the Commission asking it to decide basic business principles. Thus, the Commission correctly refused this rationale in rejecting the Joint Petitioners' proposed language.

Third, the Joint Petitioners claim that its "proposed 7.5% liability cap is reasonable and proportional balance between the risk of incurring harm versus the revenues that will be

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[14] It should be noted that Joint Petitioners want the ability to recover 7.5 percent of amounts paid or payable on the day the claim arose, regardless of the extent or scope of their damage, ***in addition to*** any bill credits that they may receive. *See* Joint Petitioner Exhibit A at GT&C § 10.4.1 ("provided that the foregoing provisions shall not be deemed or construed ... or (B) limiting either Party's right to recover appropriate refund(s) of or rebate(s) or credit(s) for fees, charges, or other amounts paid at Agreement rates ....").

[15] *See In the Matter of BellSouth Telecommunications, Inc. v. NewSouth Communications, Corp.*, Docket No. P-772, Sub at 6 (Jan. 20, 2005) ("*NewSouth Reconsideration Order*"); *BellSouth Telecommunications, Inc. v. Mississippi Public Serv. Comm'n, et al.*, Civil Action No. 3:05CV173LN at 13 (Apr. 13, 2005) (quoting *E.spire Communications, Inc. v. N.M. Pub. Regulation Comm'n*, 392 F.3d 1204, 1207 (10th Cir. 2004) (citing *Verizon Md., Inc. v. Global Naps, Inc.*, 377 F.3d 355, 364 (4th Cir. 2004); *see also*, *BellSouth Telecommunications, Inc. v. Cinergy Communications Co., et al.*, Civil Action No. 3:05-CV-16-JMH, Memorandum Opinion and Order, at 12, n.3 (E.D. Ky. Apr. 22, 2005) ("the Court is likely to find that due to the fact that the interconnection agreements are not privately negotiated contracts, the Mobile-Sierra doctrine is not applicable.") (citations omitted).

generated under this Agreement." JP Petition at 15. As correctly found by the Commission, there is nothing reasonable about Joint Petitioners' proposed language. This conclusion is supported by the undisputed fact that (1) the Joint Petitioners are aware of no interconnection agreement that contains language that is identical or similar to what the Joint Petitioners propose here;[16] (2) the Joint Petitioners' current interconnection agreements limit liability to bill credits;[17] (3) none of the Joint Petitioners have similar limitation of liability language in their tariffs or standard contracts with Kentucky consumers;[18] (4) instead, the Joint Petitioners, like BellSouth, limit their liability to bill credits;[19] and (5) KMC and NuVox even impose on their Kentucky customers limitation of liability language for claims resulting from gross negligence or willful misconduct.[20]

Further, there is nothing reasonable in language that results, after three years and based on the current billings between BellSouth and NuVox, in BellSouth's liability to NuVox being capped at ***$8,100,000*** while NuVox's liability to BellSouth would be limited to ***$2,700***. (FL Tr. at 180; KY Tr. at 63-64). Such a result is inherently unfair, not the standard in the industry, has never been replicated or employed in any other interconnection agreement, and only benefits the Joint Petitioners. Accordingly, the current practices of the Joint Petitioners as well as the real-world ramifications of the Joint Petitioners' language definitively establish that the Commission correctly rejected the Joint Petitioners' 7.5 percent liability cap.

For all of these reasons, the Commission correctly refused to adopt the Joint Petitioners' proposed language for Issue No. 4. The rejected language exceeds the standard governing

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[16] *See* Joint Petitioners Supplemental Response to Request for Production No. 6; Russell Depo. at 43.

[17] (KY Tr. at 25).

[18] (FL Tr. 182, 184; FL Exhibit 15 at § 2.1.3(C)).

[19] *Id.*

[20] *See* Johnson Depo. at 62; KMC Tariff at § 2.1.4(h); FL Exhibit 15 at § 2.1.3(B). The limitations for gross negligence or willful misconduct, of course, exceed BellSouth's limits of liability.

BellSouth's end users, exceeds the standard governing the Joint Petitioners' end users, exceeds the standard governing the Joint Petitioners in their current interconnection agreements with BellSouth, exceeds the standard established by an FCC Bureau and other state commissions, and is not replicated in any other interconnection agreement.

ISSUE NO. 6

In the *Order*, the Commission correctly rejected the Joint Petitioners' proposed language for Issue No. 6, wherein it found that "the language proposed by the Joint Petitioners is not necessary and should not be placed in the interconnection agreement." *Order* at 5. The Joint Petitioners claim that they seek reconsideration or clarification of this decision in the opening paragraph of the Petition. However, in their discussion of this adverse finding, they "applaud" the Commission's rejection of their language. JP Petition at 16. Accordingly, it does not appear that the Joint Petitioners are seeking reconsideration or clarification of this decision in any respect. Accordingly, the Commission should summarily reject this component of the Joint Petitioners' Petition.

ISSUE NO. 36

Regarding Issue No. 36 and line conditioning, the Joint Petitioners request that the Commission clarify "its decision so that it sets forth the Joint Petitioners' proposed language as the language the Commission adopts for incorporation into the Agreement." For the reasons set forth in BellSouth's Petition for Rehearing (which, for the sake of brevity, BellSouth incorporates by reference herein), such clarification is inappropriate because the Joint Petitioners' proposed language would require BellSouth to provide line conditioning at TELRIC to the Joint Petitioners even when such line conditioning exceeds the line conditioning that BellSouth provides to its retail customers. Therefore, for this reason and those set forth more

fully in BellSouth's Petition for Rehearing, the Commission should refuse to adopt the Joint Petitioners' proposed language for Issue No. 36.

ISSUE NO. 51

Regarding Issue No. 51 and the Enhanced Extended Links ("EEL") audits, the Joint Petitioners assert that the Commission declined to decide the issue and thus request that the Commission "clarify its decision to find that no audit language will be included in the Agreement (or that such audit provisions will be inoperative) until such time as the Commission decides the issue in this arbitration docket." JP Petition at 19. In making this request, the Joint Petitioners fully acknowledge and unabashedly state that they "are seeking to temporarily suspend BellSouth's audit rights while this issue remains unresolved." *Id.* at 19, n.5.

As an initial matter, the Joint Petitioners' request should be denied because they misconstrue the Commission's *Order*. Specifically, in the *Order*, the Commission did not "decline to address this issue" as claimed by the Joint Petitioners. JP Petition at 19. Rather, the Commission "***reaffirm[ed]*** its previous orders which are pending in litigation and decline[d] to address the matter ***further herein***." (emphasis added). Thus, the Commission did decide the issue by reaffirming what it has previously held in Case No. 2004-00295 on this identical issue.[21] Consequently, the Joint Petitioners characterization of the Commission's decision and primary basis of their argument is fundamentally flawed. While the Joint Petitioners may not like the Commission's decision in this arbitration, it clearly rendered a decision.

[21] It is clear that the Commission's decision in Case No. 2004-00295 resolves Issue No. 51(c) – there is no requirement that the parties mutually agree to the selection of the auditor. Furthermore, it is also clear that the Commission's decision in Case No. 2004-00295 also addressed Issue No. 51(b) – scope of auditor – as it limited BellSouth's audit rights to 15 circuits for which it had "shown concern." BellSouth has sought rehearing/clarification regarding the scope of audit issue. Thus, any ambiguity regarding the Commission's *Order* should be addressed on rehearing, but in no event is it accurate to state that the Commission failed to decide the arbitration issue.

Moreover, even if the Joint Petitioners were correct (which they are not), adoption of their request – no EEL audit language until the Commission "completes its arbitration of this issue" -- would establish an impossible condition precedent. Namely, the Joint Petitioners are fully aware that there is no proceeding specifically between the parties other than the instant proceeding to address this issue in Kentucky. And the Commission has already refused BellSouth's request to move consideration and resolution of the issue to the Generic Proceeding. Thus, upon information and belief, there is no means in which the Commission can "complete its arbitration of this issue" because the Commission has already completed the arbitration and has issued a decision. Therefore, adopting the Joint Petitioners' position would result in the Joint Petitioners forever preventing BellSouth from exercising its federal right to conduct EEL audits. The Commission should refuse to provide the Joint Petitioners with an opportunity to violate the law unchecked in contravention of BellSouth's rights and federal law.

Accordingly, the Commission should reject the Joint Petitioners' request for clarification. As stated above, it is unnecessary and improper because the Commission did decide Issue No. 51 in the arbitration.

ISSUE NO. 88

Without citing to any relevant authority,[22] the Joint Petitioners boldly and erroneously claim that the Commission's finding that BellSouth has no Section 251 obligation to expedite a service order is "contrary to law." JP Petition at 9. The Commission should summarily disregard this unsupported statement. Perhaps by oversight, the Joint Petitioners fail to mention that the Commission's conclusion is consistent with the decision of the Florida Commission, which found that BellSouth's pricing of expedites is nondiscriminatory and should not be priced

[22]As stated in BellSouth's post-hearing briefs (Initial Brief at 58; Reply Brief at 44), Joint Petitioners' general references to federal law (for example, Sections 251 and 252 of the Act and the FCC's TELRIC pricing rules) is unavailing and unpersuasive as nothing therein addresses (or implies) that BellSouth is obligated to expedite a service order at TELRIC.

at TELRIC.[23] Accordingly, Joint Petitioners' claim that the Commission's decision is "contrary to law" is false.

Continuing with unsupported assertions, the Joint Petitioners then repeat the claim that BellSouth waives expedite charges for it retail customers and thus "the Commission's decision permits the continuation of an unlawful and discriminatory practice . . . ." JP Petition at 9-10. First, the Joint Petitioners presented no credible evidence to support this rank speculation. To the contrary, BellSouth witness Blake testified that BellSouth treats its retail and CLEC customers in the same manner regarding the waiving of expedite charges. That is, if a service expedite request is not met, the customer (retail or CLEC) is not charged a service expedite rate. (KY Tr. at 170). Moreover, the Florida Commission flatly rejected such speculation, finding that "[t]here was no conclusive evidence provided by the Joint Petitioners that BellSouth routinely foregoes charges for its retail customers." FPSC Order No. PSC-05-0975-FOF-TP at 59. The Commission should not reverse its sound decision on this issue based on pure speculation.

Next, without providing any analysis or explanation, Joint Petitioners assert that "by adopting BellSouth's federally tariffed rate . . . [the Commission] adopt[ed] a rate that fails to comport with the standards of Sections 251 and 252." JP Petition at 10. Joint Petitioners' assertion misses the mark. As a matter of law, in the absence of a finding of impairment under Section 251, TELRIC pricing is inappropriate and impermissible. *See* 47 U.S.C. § 252(d)(2); *USTA II*, 359 at 589 ("we find nothing unreasonable in the Commission's decision to confine TELRIC pricing to instances where it has found impairment."). The Joint Petitioners failed to prove that they were impaired by paying a service expedite charge that BellSouth's retail

[23] FPSC Order No. PSC-05-0975-FOF-TP at 59 ("BellSouth is treating CLECs and its own customers in an identical manner with regard to the pricing of service expedites. Parity exists, thus TELRIC simply does not apply in our opinion."). In a ruling that cannot be reconciled with the evidence, a panel of the North Carolina Utilities Commission reached the opposite conclusion. *Recommended Arbitration Order,* NCUC Docket No. P-77, Sub 8 et al., at 68 (July 26, 2005). BellSouth has objected to the Panel's ruling on this issue and a final order from the full North Carolina Commission is pending.

customers pay (and the Commission did not conduct a Section 251 analysis) and thus the Commission correctly concluded that BellSouth has no Section 251 obligation to expedite services orders. *Order* at 17. As succinctly stated by the Joint Petitioners, "[t]he Commission is confined to imposing arbitration results that are consistent with 251 obligations and cannot impose the creation of exceptions to those obligations . . . .." JP Petition at 2. BellSouth could not have said it better.

Finally, Joint Petitioners make the unsupported (and in the case of Xspedius, misleading) assertion that the Commission's service expedite ruling "puts the Joint Petitioners at a distinct competitive disadvantage." JP Petition at 10. Joint Petitioners presented no evidence to support this claim. In fact, NuVox presented no evidence that it has ever attempted to expedite a service order. Further, KMC candidly admitted that BellSouth has no obligation to expedite services orders and that KMC can look to alternative measures to satisfy its customers' service request. (Collins Depo. at 58-59). Finally, the Joint Petitioner most vocal about this issue, Xspedius, potentially makes money on a service expedite ordered from BellSouth because it charges its Kentucky customers an ***$800 service expedite charge*** and reserves the right to charge more in certain circumstances. (KY Tr. at 116-117; Xspedius Tariff § 12.4).[24]

In sum, the Joint Petitioners are seeking something more than standard provisioning intervals priced at TELRIC without any legal justification for doing so. Accordingly, the Commission should refuse to reconsider its decision for Issue No. 88.

ISSUE NO. 97

The Commission correctly concluded that Joint Petitioners should pay their bills on or before the payment due date. *Order* at 17. The Commission's ruling is consistent with the well

[24] In contrast, BellSouth's federal tariff sets forth a ***$200*** per circuit, per day service expedite charge.

reasoned decision rendered by the Florida Commission, which concluded that "payment of charges for services shall be payable on or before the next bill [i.e. payment due] date."[25]

As explained below, Joint Petitioners' arguments in support of their petition for reconsideration on this issue are unavailing and inaccurate. Joint Petitioners claim that the "record shows that BellSouth, on average, takes 7 days to post or deliver a bill." JP Petition at 13. This statement is false. As explained in BellSouth's post-hearing briefs (Initial Brief at 62; Reply Brief at 46-47), Joint Petitioners continue to ignore the fact the ***record in three states*** unquestionably demonstrates that the most recent, reliable, and accurate data on this issue (SQM results for billing invoice timeliness) shows that Joint Petitioners receive their bills, on average, in about 3 or 4 days from the bill date. (KY Tr. at 142-145; KY BellSouth Exhibit 3; FL Tr. at 417-423; FL BellSouth Exhibit 19; GA Tr. at 517-518; GA BellSouth Ex. 15). In contrast, Joint Petitioners either did not conduct a bill study (KY Tr. at 142) or they offered testimony regarding the results of outdated and inaccurate bill "studies" that were never produced. (Russell FL Staff Depo. at 64-66; Falvey Depo. at 311-312).

Moreover, the payment activities of NuVox belie any claim by the Joint Petitioners that being obligated to pay their bills by the payment due day (generally 30 days from a bill date) – the standard applicable in the current interconnection agreements – is insufficient to timely pay bills. Indeed, NuVox witness Russell has repeatedly testified that NuVox has paid all of its bills in a timely manner for the last two years. (FL Tr. at 264); (GA Tr. at 513). Consequently, the Joint Petitioners' assertions and arguments are directly refuted by their own testimony.

Joint Petitioners claim that "there is no record evidence that Xspedius has been able to comply [with BellSouth's payment terms]." JP Petition at 13. This statement is accurate because Xspedius, unlike NuVox, habitually pays its BellSouth bills late. Xspedius' late

[25] FPSC Order No. PSC-05-0975-FOF-TP at 64 (Oct. 11, 2005).

payment behavior, however, is not dispositive of the issue, especially since Xspedius' poor payment history is directly refuted by the payment behavior of NuVox. The mere fact that NuVox can and has timely paid all BellSouth bills for the last two years definitively establishes that the Commission correctly adopted BellSouth's position on this issue.

The Joint Petitioners reiterate their irrelevant and inaccurate claim that "BellSouth measures its payment of Joint Petitioners bills within 30 days from the ***receipt*** of an invoice." JP Petition at 14. As explained in BellSouth's Reply Brief at 48, BellSouth used the date it received bills to provide a meaningful way to measure its payment history with the Joint Petitioners because certain Joint Petitioners could not provide BellSouth with a timely bill. (GA Tr. at 1136). Regardless of when BellSouth decides to pay a bill, BellSouth is subject to late payment charges if it fails to timely pay its bills. Tellingly, the Joint Petitioners even expect BellSouth to pay some of their bills ***within 20 days of the bill date***. (FL BellSouth Ex. 23).

Further, the Joint Petitioners make the unfounded claim that implementing the substantial billing systems modifications that would be required to accommodate the Joint Petitioners request for special payment treatment, evidently "would not be very difficult at all." JP Petition at 14. This statement is pure conjecture, and at odds with the evidence. In any event, the Joint Petitioners have made clear that they are unwilling to pay for any costs that would be associated with granting their request for special billing treatment. (FL Tr. at 416; GA Tr. at 518). Given that there is no basis for giving special billing treatment to Joint Petitioners, the Florida Commission correctly concluded that "BellSouth shall not be ordered to make substantive changes to its billing systems on behalf of the Joint Petitioners, and at is own expense, in order to exceed 'parity' performance."[26]

[26] FPSC Order No. PSC-05-0975-FOF-TP at 64.

In sum, the Joint Petitioners have provided no basis for the Commission to reconsider its decision not to grant special payment terms to Joint Petitioners. Accordingly, for all of the foregoing reasons, the Commission should deny the Joint Petitioners' request for reconsideration of Issue No. 97.

ISSUE NO. 102

Consistent with the decisions reached by the North Carolina Panel[27] and the Florida Commission,[28] this Commission correctly concluded that BellSouth's payment for services provided by the Joint Petitioners and the Joint Petitioners' deposits held by BellSouth are separate and distinct matters. Accordingly, the Commission rejected the Joint Petitioners' deposit offset proposal. *Order* at 19. In asking the Commission to reverse its *Order*, Joint Petitioners repeat arguments that the Commission has already rejected – specifically the allegation that "[t]he record shows that BellSouth has a history of amassing giant amounts past due." JP Petition at 16-17. As discussed in BellSouth's post-hearing briefs (Initial Brief at 69-70; Reply Brief at 54-55), Joint Petitioners' characterization of the record is inaccurate.

Regarding NuVox, there is no evidence that BellSouth has amassed any amount past due to NuVox, much less "giant amounts." Regarding Xspedius, the record shows that BellSouth is current or has overpaid its reciprocal compensation bills. (KY Tr. at 117-118; KY BellSouth Exhibit 2). Thus, the Commission should once again dismiss the Joint Petitioners' proposal. The record squarely and convincingly rebuts the Joint Petitioners' grossly exaggerated claim that BellSouth has a poor payment history.

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[27] *Recommended Arbitration Order,* NCUC Docket No. P-77, Sub 8 at 88 ("Commission concludes that CLPs should not be allowed to offset security deposits by amounts owed to them by another carrier.")

[28] FPSC Order No. PSC-05-0975-FOF-TP at 70 ("We find that reducing the deposit BellSouth requires from the Joint Petitioners by past due amounts owed by BellSouth is not appropriate.").

Further, amounts that BellSouth may owe (if any) to Xspedius misses the mark and have nothing to do with the credit risk posed by Xspedius. As explained by the Florida Commission:

> . . . we find that requiring a deposit from the Joint Petitioners and the dispute of charges or late payment made by BellSouth are separate issues. A deposit required under the interconnection agreement is intended to protect the ILEC from the financial risk of non-payment for services provided to the CLEC. ***If BellSouth has a billing dispute or is late paying one of the Joint Petitioners, it should not impact the amount of deposit from the Joint Petitioners because the dispute or late payment by BellSouth in no way reduces the amount of services provided to the Joint Petitioners.*** Moreover, there are other remedies in place which address past due payments (disputed and undisputed) such as late payment charges, and suspension/termination of service. As such, the amount of the deposit BellSouth requires from a Joint Petitioner shall not be reduced by past due amounts owed by BellSouth to CLEC.[29]

This sound analysis is consistent with the Commission's ruling, and the Joint Petitioners have failed to articulate any reason why the Commission's ruling should be reversed.

Finally, as an alternative position, the Joint Petitioners request that the Commission "modify its order to clarify that the Joint Petitioners' proposed language will be adopted with the caveat that offsets will pertain only to undisputed past due amounts." JP Petition at 18. Such a modification is unnecessary. In adopting BellSouth's compromise position, the Commission correctly noted that BellSouth's proposal is properly limited to "undisputed past due amounts, if any, that BellSouth owes the CLEC." *Order* at 20. Accordingly, there is no reason for the Commission to modify its ruling on this issue.

In sum, the Joint Petitioners have simply rehashed previously rejected arguments in support of their request for the Commission to reconsider its decision on Issue 102. In the alternative, Joint Petitioners make a proposal that is unnecessary, given BellSouth's language.

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[29] FPSC Order No. PSC-05-0975-FOF-TP at 71 (Oct. 11, 2005) (emphasis added).

Accordingly, for all of these reasons, the Commission should deny Joint Petitioners' request for reconsideration of Issue No. 102.

CONCLUSION

For all of the foregoing reasons, BellSouth respectfully requests that the Commission deny the Joint Petitioners' Petition for Reconsideration and Clarification.

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CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was served on the individuals on the attached service list by mailing a copy thereof, this 28th of October 2005.

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